

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

SNOHOMISH COUNTY FARM BUREAU,

Petitioner,

v.

SNOHOMISH COUNTY,

Respondent.

Case No. 14-3-0013

(SCFB III)

ORDER OF DISMISSAL ON MOTIONS

This matter came before the Board on Respondent Snohomish County's motion for dismissal and Petitioner Snohomish County Farm Bureau's motion to supplement the record. The Farm Bureau challenges the County's adoption of Ordinance 14-066 which authorized the County to enter into an Interlocal Agreement with Diking Improvement District No. 5 in connection with the Smith Island Restoration Project. The County contends the Board lacks jurisdiction to review the County's action because it is a site-specific land use decision, not a comprehensive plan or development regulation amendment within the Board's purview. The Farm Bureau responds that the Interlocal Agreement is an implied tacit amendment to the County's comprehensive plan and regulations within the Board's jurisdiction.

The Board finds the supplemental documents are necessary or of substantial assistance to its determination of the "tacit amendment" question. The motion to supplement the record is therefore granted. However, upon thorough consideration of the facts and authorities, the Board concurs with the County that review of the Interlocal Agreement is not within the Board's statutory jurisdiction, and the matter is dismissed.

The Board had before it the following:

- Snohomish County's Motion to Dismiss for Lack of Subject Matter Jurisdiction, January 7, 2015

- Petitioner's Motion to Supplement Record, January 7, 2015 (requesting 20 additions, 14 included as attachments).
- Petitioner's Response to Respondent's Motion to Dismiss, January 20, 2015.

Factual Background and Positions of the Parties

Snohomish County Ordinance No. 14-066 adopts an interlocal agreement (ILA) between Snohomish County and Diking Improvement District 5 (Diking District) concerning construction and post-construction commitments relative to the Smith Island Restoration Project.¹ The Smith Island Restoration Project is a habitat restoration project involving construction of a new setback dike and breaching portions of an existing outer dike to allow tidal inundation of approximately 400 acres of agricultural land in the Snohomish River basin for salmon recovery purposes.²

The County contends the Board lacks subject matter jurisdiction to review the County's adoption of the ILA because it is an agreement in connection with a project permit action, not an amendment to a comprehensive plan or development regulation.³ The County explains the ILA is an agreement resolving various appeals⁴ by the Diking District and various property owners challenging the County's issuance of a shoreline substantial development permit.

The Farm Bureau counters the ILA authorizes inundation of designated agricultural land in violation of the County's comprehensive plan; thus the ILA is a tacit plan amendment, the Farm Bureau asserts, not a mere project permit action.⁵

Supplementation of the Record

The Farm Bureau requests the record be supplemented with 20 documents primarily focused on the agricultural potential for use of the land. The Board notes a number of these documents are taken from the file of SHB No. 14-002, the appeal of the County's shoreline

¹ Caption, Ordinance No. 14-006, September 10, 2014, attached as Exhibit B to Petition for Review.

² Ordinance 14-066, p. 1, Recital 4.

³ Motion to Dismiss, at 5-7.

⁴ Appeals were filed before the Shoreline Hearings Board in SHB No. 14-002.

⁵ Petitioner's Response, at 3-4.

1 substantial development permit for the project, and can be no surprise to the County. In the
2 interest of ensuring a thorough understanding of the question before us, the Board **admits**
3 petitioner's supplemental exhibits 1 through 20.

5 **The Board's Statutory Jurisdiction**

6 The growth management hearings board has the powers, and only those powers,
7 granted by statute, either specifically or by implication.⁶ The GMA "is not to be liberally
8 construed." *Woods v. Kittitas County*, 162 Wn.2d 597, 612 n.8, 174 P.3d 25 (2005). The
9 jurisdiction of the Board is defined in RCW 36.70A.280(1), the relevant portion of which is
10 set out below:
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12 (1) The growth management hearings board shall hear and determine only
13 those petitions alleging either:

14 (a) That, except as provided otherwise by this subsection, a state agency,
15 county, or city planning under this chapter is not in compliance with the
16 requirements of this chapter, chapter 90.58 RCW as it relates to the adoption
17 of shoreline master programs or amendments thereto, or chapter 43.21C
18 RCW as it relates to plans, development regulations, or amendments,
19 adopted under RCW 36.70A.040 or chapter 90.58 RCW.

20 and RCW 36.70A.290(2):

21 All petitions relating to whether or not an adopted comprehensive plan,
22 development regulation, or permanent amendment thereto, is in compliance
23 with the goals and requirements of this chapter or chapter 90.58 or 43.21C
24 RCW must be filed within sixty days after publication as provided in (a)
25 through (c) of this subsection.

26 The jurisdictional purview of the Board was underscored by the Washington Supreme
27 Court in *Wenatchee Sportsmen Association v. Chelan County*⁷:

28 The GMA . . . limits the kinds of matters that GMHBs may review: "A
29 growth management hearings board shall hear and determine only those
30 petitions alleging . . . [t]hat a state agency, county, or city planning under
31 this chapter is not in compliance with the requirements of this chapter. . . ."
32 RCW 36.70A.280(1)(a). Another provision of the GMA spells out in

⁶ *Skagit Surveyors and Engineers v. Friends of Skagit County*, 135 Wn.2d 542, 567, 958 P.2d 962 (1998).

⁷ 141 Wn.2d 169, 178, 4 P.3d 123 (2000).

1 greater detail the subject matter of each petition: "All petitions relating to
2 whether or not an adopted comprehensive plan, development regulation,
3 or permanent amendment thereto, is in compliance with the goals and
4 requirements of this chapter . . . must be filed within sixty days after
5 publication. . . ." RCW 36.70A.290(2). From the language of these GMA
6 provisions, we conclude that unless a petition alleges that a comprehensive
7 plan or a development regulation or amendments to either are not in
8 compliance with the requirements of the GMA, a GMHB does not have
9 jurisdiction to hear the petition.

10 The Board's jurisdiction does not include review of site-specific project permit actions.
11 In *BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Board*,⁸
12 the Court of Appeals explained: "The Board does not have jurisdiction to decide challenges
13 to project permit applications or site-specific land use decisions, because such decisions do
14 not qualify as comprehensive plans or development regulations." RCW 36.70C.020(4)
15 defines the term "project permit" as follows:

16 "Project permit" or "project permit application" means any land use or
17 environmental permit or license required from a local government for a
18 project action, including but not limited to . . . shoreline substantial
19 development permits . . . but excluding the adoption or amendment of a
20 comprehensive plan, subarea plan, or development regulations. . . .

21 **Board Discussion and Analysis**

22 Under RCW 36.70A.280(1)(a), the Board has very limited jurisdiction which
23 encompasses "only those petitions" challenging whether a city's comprehensive plan,
24 development regulations, or amendments thereto comply with the GMA, SMA, and SEPA.
25 *Somers v. Snohomish County*, 105 Wn. App. 937, 942, 21 P.3d 1165 (2001).

26 In the matter before the Board, the County's adoption of the Interlocal Agreement did
27 not amend the County's Comprehensive Plan or its development regulations. The ILA
28 resolved a number of design and construction issues associated with the Smith Island
29 Restoration Project being undertaken on County-owned land within the boundaries of the
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⁸ 165 Wn. App. 677, 684, 269 P.3d 300 (2011).

1 Diking District.⁹ The ILA settled appeals of a shoreline substantial development permit
2 issued by the County for the project.¹⁰

3 The Board has read the ILA carefully and can find no basis for characterizing it as
4 anything other than a project permit action. The agreement was entered into in order to
5 resolve challenges to the County's issuance of a shoreline substantial development permit.
6 In the ILA, the County and Diking District spell out the details of the dike construction
7 project, specify construction materials, design, and schedule, assign risks and
8 responsibilities, and clarify title to land and improvements. Managing and mitigating impacts
9 to the aquifer, to downstream dikes, to navigation requirements of Buse Timber and the Port
10 of Everett, to truck traffic and the like are carefully assigned. These matters are clearly
11 specific to the development project for which the shoreline permit was issued.
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13 The Farm Bureau's overriding concern is that the 400 acres to be inundated by the
14 restoration project is designated agricultural land in the County's comprehensive plan and
15 the County's action violates the GMA duty to conserve agricultural land.¹¹ This is the third
16 case in which the Farm Bureau has brought the Smith Island Restoration Project before the
17 Board.
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19 In *Snohomish County Farm Bureau v. Snohomish County and Department of Ecology*
20 (*SCFB I*),¹² the Board concluded the County's Shoreline Master Program did not violate the
21 Shoreline Management Act when it allowed restoration projects to inundate and destroy
22 farm land. The Board's decision was compelled by the SMA definition of "agricultural land"
23 as land being actively farmed, RCW 90.58.065(2)(d), in contrast to the GMA definition as
24 land capable of being farmed, without regard to owner intent. RCW 36.70A.030(2), (10);
25 RCW 36.70A.170(1)(a). In dismissing *SCFB I*, the Board noted the discrepancy may require
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32 ⁹ The Interlocal Agreement is attached as Exhibit A to the Petition for Review.

¹⁰ Interlocal Agreement, p. 3-4, Paragraphs 1.4 and 1.6.

¹¹ Petition for Review, p. 3, Legal Issue 1.

¹² *SCFB I*, GMHB Case No. 12-3-0008, Final Decision and Order (March 14, 2013).

1 legislative resolution.¹³ The Board was also constrained by the narrow scope and strict
2 standard of review for SMP provisions applicable to shorelines of statewide significance.¹⁴

3 In *Snohomish County Farm Bureau v. Snohomish County (SCFB II)*,¹⁵ the Farm
4 Bureau again argued for a de-designation process prior to any restoration activities which
5 would inundate and destroy farm lands. The Board reviewed challenged comprehensive
6 plan amendments which cross-referenced policies for preservation of agricultural lands
7 policies for habitat restoration for anadromous fish in order to achieve “net gain” for both.¹⁶
8 The Board concluded the Farm Bureau had failed to advance the statutory provisions,
9 arguments, or authorities that might have carried its burden of proof.¹⁷

10 In the present case, the Farm Bureau again protests the loss of agricultural land at
11 Smith Island to salt water inundation for fish habitat restoration. However, the Farm Bureau
12 has pointed to no authorities that would allow the Board to assert jurisdiction over an ILA
13 that on its face is a component of a site-specific project permit for the Smith Island
14 restoration.¹⁸ The matter must be **dismissed**.

15 ORDER

16 Based on the foregoing, Petitioner’s Motion to Supplement the Record is **granted**.
17 Snohomish County’s Motion to Dismiss for Lack of Subject Matter Jurisdiction is **granted**.
18 The petition for review in Case No. 14-3-0013 is **dismissed** and the case is **closed**.
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29 ¹³ *Id.*, Concurring Opinion, p. 30-36.

30 ¹⁴ *Id.*, pp. 17-18, citing RCW 90.58.190(2)(c).

31 ¹⁵ *SCFB II*, GMHB Case No. 12-3-0010, Final Decision and Order (May 2, 2013).

32 ¹⁶ *Id.*, p. 9-11.

¹⁷ *Id.*, p. 1, 21.

¹⁸ ILAs have in rare instances been found to be de facto amendments of comprehensive plans. Petitioner has cited no such cases and the Board may not make its case for it.

1 Entered this 4th day of February, 2015.
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Margaret A. Pageler, Board Member
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7 Cheryl Pflug, Board Member
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10 Charles Mosher, Board Member
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12 **Note: This is a final decision and order of the Growth Management Hearings Board**
13 **issued pursuant to RCW 36.70A.300.¹⁹**
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32 ¹⁹ A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.